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# Insights into an Emerging Relationship: Use of Regional Human Rights Jurisprudence at the International Criminal Court

## ABSTRACT

This article uses the International Criminal Court's (ICC's) first case, *Prosecutor v. Thomas Lubanga Dyilo*, as a lens through which to examine the ICC's use of regional human rights jurisprudence. Content analysis of 595 judicial decisions has been used to provide an in-depth insight into the use of regional human rights jurisprudence in the early years of the Court's operation. The analysis reveals frequent reference to, and reliance on, human rights jurisprudence across the Court's three judicial divisions, throughout all stages of the Court's proceedings. It also indicates a lack of clarity in the Court's reasoning as to how reference to regional human rights jurisprudence fits within the ICC's legal framework and its impact on judicial reasoning. It is argued that whilst the tendency of the Court's judges to refer to regional human rights jurisprudence in the *Lubanga* case is highly beneficial, both for the Court and the development of international law more generally, the ambiguities surrounding the Court's practice raise several interrelated concerns. Each of these concerns can be addressed through a clearer articulation of the Court's methodology, which explains the use of regional human rights jurisprudence by reference to the ICC's rules of applicable law and interpretation.

**KEYWORDS:** judicial interaction, regional human rights courts, European Court of Human Rights, Inter-American Court of Human Rights, International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*.

## 1. INTRODUCTION

Following the establishment of the International Criminal Court (ICC) in 2002, the judges of the ICC faced a momentous task. They were called upon to bring the detailed provisions of the Rome Statute of the International Criminal Court (Rome Statute) to life and to resolve the numerous gaps, ambiguities and inconsistencies that can be found in its text.<sup>1</sup> Speaking in 2010, the President of the Trial Division of the ICC, Judge Adrian Fulford, explained that "[e]ven following the best part of a decade since its establishment, the strong feeling remains that so much is still in the process of being established. Indeed, hardly a day goes by without me scratching my head and wondering: 'gosh, how are we going to deal with this one?'"<sup>2</sup>

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, entry into force 1 July 2002, 2187 UNTS 3.

<sup>2</sup> Fulford, "The Reflections of a Trial Judge" (2011) 22 *Criminal Law Forum* 215, at 215.

As the judges of the ICC have interpreted and applied the provisions of the Rome Statute for the first time, they have done so against the background of a large body of relevant jurisprudence, produced by a range of other international, regional and domestic courts and tribunals. A significant body of relevant case law has been produced by regional human rights courts, in particular the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Whilst these institutions are tasked with determining the (civil) responsibility of States, rather than the (criminal) responsibility of individuals, they have considered many issues that the judges of the ICC will be called upon to address, including the definition of human rights violations that amount to international crimes, the permissibility of amnesties and immunities in respect of such offences, the rights of victims that have been affected by their commission and the meaning and scope of fair trial standards.

The way in which the ICC's judges refer to and use regional human rights jurisprudence has wide-ranging and significant implications. It has the potential to affect the quality of the ICC's case law, the way in which the Court is perceived by external actors and the interests of different stakeholders in its proceedings. In addition to its repercussions for the Court and its stakeholders, the ICC's engagement with regional human rights jurisprudence has much broader implications for the coherence of international law. It must be understood light of concerns that the proliferation of international courts and tribunals could allow for the fragmentation of international law as judges from different institutions address similar issues of law and fact without any formal obligation to refer to one another.<sup>3</sup> Despite the importance of the issue, the use of regional human rights jurisprudence in judicial decision-making at the ICC remains largely unexplored.

The purpose of this article is to assess the approach that the judges of the ICC have taken to regional human rights jurisprudence throughout the pre-trial and trial proceeding at the ICC in the case of *Prosecutor v. Thomas Lubanga Dyilo* (the *Lubanga* case). The focus has been placed on pre-trial and trial proceedings in a single case in order to offer a more comprehensive account of the Court's use of regional human rights jurisprudence than that provided by studies which have examined the interaction between the ICC and human rights courts in final, or select, decisions of the ICC, or in relation to specific norms, such as the prohibition of torture or compliance with fair trial standards.<sup>4</sup> By focusing on a single case, it is possible to show how regional human rights jurisprudence has been used throughout all stages of the pre-trial and trial process, in relation to a wide range of procedural and substantive issues, by all three judicial divisions of the Court.

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<sup>3</sup> See below at Section 2.A.

<sup>4</sup> See, for example, de Frouville, "The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment" (2011) 9 *Journal of International Criminal Justice* 633; Croquet, "The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?" (2011) 11(1) *Human Rights Law Review* 91.

The *Lubanga* case is an important point of focus because it was the first case to be completed by the ICC, and the case that led to the Court's first conviction.<sup>5</sup> The case concerned fairly narrow charges, namely the conscription, enlistment and use of child soldiers as war crimes under Article 8 of the Rome Statute. However, throughout the pre-trial and trial proceedings, the judges of the ICC addressed a wide range of procedural and evidentiary issues for the first time. In doing so, they provided a foundation for many aspects of the ICC's jurisprudence and produced decisions that have been returned to frequently in subsequent proceedings.

In order to provide an insight into the Court's approach, the article presents analysis of 595 of the Court's decisions, produced by a total of sixteen judges over an eight-year period in the *Lubanga* case.<sup>6</sup> The sample of decisions encompasses all publicly available English language decisions produced by the Court between the issuance of an arrest warrant against the accused in February 2006 and the final decisions of the Appeals Chamber on appeal of conviction and sentence in December 2014.<sup>7</sup> The analysis indicates that a strong relationship is forming between the ICC and regional human rights courts, and between the ICC and the ECtHR in particular. It is argued that whilst this relationship is beneficial for the ICC and for the development of international law more generally, trends identified in the Court's decisions raise several interrelated concerns. Each of these concerns could be addressed through the development of more precise judicial reasoning, which situates reference to regional human rights jurisprudence within the ICC's rules of applicable law and interpretation.

The remainder of the article is divided into 6 sections. Section 2 begins by highlighting the significance of the ICC's interaction with regional human rights jurisprudence. Section 3 sets out the legal framework that governs the interaction between the ICC and regional human rights courts. Section 4 examines the ICC's approach to regional human rights jurisprudence in the *Lubanga* case. Section 5 goes on to discuss the implications of the Court's approach and the issues raised by lack of clarity in the Court's reasoning. Section 6 proposes how such clarity could be achieved.

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<sup>5</sup> *Lubanga* ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012.

<sup>6</sup> The judges include: in the Pre-Trial Chamber, Judge Jorda, Judge Kuenyehia, Judge Steiner; in the Trial Chamber Judge Fulford, Judge Odio Benito and Judge Blattman; and in the Appeals Chamber, Judge Pikis, Judge Kirsch, Judge Pillay, Judge Song, Judge Koroula, Judge Nsereko, Judge Usaska, Judge Van den Wyngaert, Judge Monageng and Judge Trendafilova.

<sup>7</sup> The analysis is based on decisions publicly available through the ICC's Legal Tools as of August, 2015. See <https://www.legal-tools.org/en/go-to-database/>.

## 2. REGIONAL HUMAN RIGHTS JURISPRUDENCE AND THE ICC: THE SIGNIFICANCE OF INTERACTION

Regional human rights courts have produced a wealth of jurisprudence on issues of relevance to the ICC, raising the question of when, if at all, the ICC's judges should turn to it in the interpretation and application of the Court's substantive and procedural law. The sections below outline a range of positive and negative implications associated with the Court's engagement with regional human rights jurisprudence. Whilst the beneficial implications provide a strong justification for the Court's engagement with regional human rights jurisprudence, the negative implications can be minimised by the judges of the ICC, in part through the development of clear judicial reasoning.

### A. The Coherence of International Law

Perhaps the most obvious benefit associated with reference to regional human rights jurisprudence in judicial decision-making at the ICC is its potential to contribute to the coherence of international law on issues that cross the boundary between international criminal law and human rights law. The willingness of the judges of the ICC to engage with external jurisprudence has significance against the backdrop of concerns that the adjudication of similar issues before different, and formally unconnected, judicial mechanisms could result in the fragmentation of international law.<sup>8</sup> Fragmented jurisprudence is undesirable because of its potential to affect the certainty and clarity of the law, which, in turn, has implications for its fairness, effectiveness and perceived legitimacy.<sup>9</sup>

Academic literature on the fragmentation of international law has repeatedly highlighted the important role that judges can play in promoting coherence through informal inter-institutional interaction, including reference to the case law of other judicial institutions.<sup>10</sup>

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<sup>8</sup> For discussion of the threat of fragmentation in international law, see Symposium in (1999) 31 *New York University Journal of International Law and Politics*; Symposium in (2003-2004) 25 *Michigan Journal of International Law*; Koskeniemi and Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *Leiden Journal of International Law* 553; Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recueil des Cours* 101. See also Report of the Study Group of the International Law Commission, finalised by Koskeniemi, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (A/CN.4/L.682), 13 April 2006, at 1.

<sup>9</sup> For discussion of the connection between the coherence of international law and its legitimacy, see Franck, "Legitimacy in the International System" (1988) 82(4) *The American Journal of International Law* 705, at 735-51.

<sup>10</sup> Charney, *supra* n 8; Guillaume, "Advantages and Risks of Proliferation: A Blueprint for Action" (2004) 2 *Journal of International Criminal Justice* 300, at 302; Burke-White, "International Legal Pluralism" (2004) 25 *Michigan Journal of International Law* 963, at 971-73; Teitel and Howse, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order" (2008-2009) 41 *New York University Journal of International Law & Politics* 959, at 964-67; Ulfstein, "International Courts and Judges: Independence, Interaction and Legitimacy" (2014) 46 *New York University Journal of international Law and Politics* 849, at 858.

The ICC's engagement with external jurisprudence has additional significance because of the Court's status as the only permanent international criminal court and, consequently, its potential to influence the reasoning of other judicial institutions tasked with the adjudication of international crimes.

The potential for fragmentation in the case law of the ICC and regional human rights courts is high because of the significant overlap in the legal and factual issues that they are called upon to address. It will be particularly visible when the ICC and human rights courts address human rights violations amounting to international crimes stemming from the same factual situations. Different approaches to the definition of human rights violations amounting to international crimes could have a significant impact on the strength of the message communicated by the ICC and regional human rights courts and their ability to deter the commission of future atrocities. Whilst fragmentation in the procedural law of the ICC and regional human rights jurisprudence may be less visible, since the factual issues addressed by the institutions are less likely to align, its impact on the clarity of the law could be equally detrimental.

Of course, a degree of inconsistency in the case law of the ICC and regional human rights courts may sometimes be both necessary and desirable, given their differing functions and distinctions in their applicable law. The focus of international criminal law on the responsibility of individuals and human rights institutions on the responsibility of States may justify distinctions in the definitions of international crimes and parallel violations of human rights.<sup>11</sup> The unique characteristics of international criminal proceedings have also been understood to justify an interpretation of fair trial standards that departs from human rights jurisprudence, which speaks to domestic proceedings.<sup>12</sup> However, even where the ICC departs from the case law of regional human rights courts, the process of interaction has the benefit of ensuring that inconsistencies are not produced arbitrarily, but are based on clear reasoning.

## **B. The Quality of the ICC's Case Law**

Much of the existing literature on judicial interaction has focused on the implications of the practice for the coherence of international law.<sup>13</sup> An equally significant benefit is the impact of judicial interaction on the quality of the Court's own jurisprudence.

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<sup>11</sup> A key example is the definition of torture, which differs in international criminal law and human rights law. See Burchard, "Torture in the Jurisprudence of the *Ad Hoc* Tribunals: A Critical Assessment" (2008) 6 *Journal of International Criminal Justice* 159, 162-63.

<sup>12</sup> In one of its early decisions, the ICTY, for example, held that the principle of equality of arms "must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts". *Tadić*, IT-94-1-A, Judgment, 15 July 1999, para 52.

<sup>13</sup> See, for example, Millar, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals" (2002) 15(3) *Leiden Journal of International Law* 483. Brown, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International

At the domestic level, comparative reasoning has been recognised as a valuable means of introducing new ideas into the judicial decision-making process, allowing judges to approach problems more creatively or with greater insight.<sup>14</sup> In response to concerns about the risk of fragmentation in international law, a number of writers have emphasised the value of the proliferation of international courts and tribunals in providing greater scope for comparative reasoning and exchange of ideas at the international level.<sup>15</sup> The exchange of ideas can serve to prompt greater depth of reasoning and, in doing so, enhance the quality of judicial decisions that are produced.<sup>16</sup>

The overlap in the applicable law of the ICC and regional human rights courts creates a strong basis for judicial interaction. Reference to the case law of established human rights courts may be particularly valuable in the early years of the ICC's operation, when the judges of the Court are called upon to address issues for the first time without any prior ICC case law to refer to. However, the benefits of the practice are not confined to this period. Engagement with regional human rights jurisprudence could play a valuable role in the Court's future years by preventing stagnation of the Court's case law and prompting reconsideration of established approaches in light of broader changes in law and society.

Even if the judges of the ICC decide to depart from the approaches taken by judges in regional human rights courts, the process of referring to and rejecting them could serve to enrich judicial debate and prompt stronger justifications for the approaches that are ultimately adopted. In this respect, interaction between the ICC and regional human rights courts can be viewed as beneficial regardless of whether or not it contributes to the coherence of international law.

### **C. The Perceived Legitimacy of the ICC**

A further benefit of reference to regional human rights jurisprudence relates to the perceived legitimacy of the Court. In his discussion on the universality of international law, Judge Bruno Simma, former judge of the International Court of Justice, argued that "it will obviously add to the legitimacy of a judgment if an international court relies on the case law of other such courts, applies and maybe develops it, without, however, changing it

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Courts and Tribunals" (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 219. See also n 10 above.

<sup>14</sup> Slaughter, *A New World Order* (2004) at 77.

<sup>15</sup> Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals" (1999) 31 *New York University Journal of International Law and Politics* 697, at 700. Kingsbury, "Forward: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1999) 31 *New York University Journal of International Law and Politics* 679, at 681-82.

<sup>16</sup> On the connection between the depth of reasoning contained in judicial decisions and the quality of international case law, see Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *The Yale Journal of International Law* 273, at 320-23. Charney, *supra* n 8, at 130.

fundamentally”.<sup>17</sup> It does so not only by allowing judges to show that they have been constrained by the law,<sup>18</sup> but also by providing evidence of support for the court’s reasoning. Evidence of conservatism and consensus is important in the international criminal context, where judicial decisions have significant implications not only for the rights and liberties of individuals, but also for the interests of States. Again, this benefit may be particularly great in the early years of the Court’s operation, when judges are called upon to address issues for the first time without their own case law to refer to.

The legitimising effect of reference to external jurisprudence does, however, depend heavily on the perceived legitimacy of the institutions referred to and views on the appropriateness of referring to them. With this in mind, it is important to highlight two potentially negative implications of the Court’s reference to regional human rights jurisprudence, which raise concerns about the nature and scope of the interaction between the ICC and regional human rights courts.

#### **D. Cultural Bias**

One of the greatest concerns raised by the ICC’s reference to human rights case law is its potential to introduce cultural bias into the law of the Court and to undermine the perception of the Court as a truly international institution. This perception is crucial for the ICC’s universal acceptance and, in turn, its effectiveness in bringing the perpetrators of international crimes to justice. The risk is rooted in the fact that regional instruments and case law contain regional variations.<sup>19</sup> Reference to the decisions of institutions representing specific regions of the world could lead the law of the ICC to disproportionately reflect certain regional views, values and concerns.

If the judges of the ICC do refer to regional human rights jurisprudence, the potential for cultural bias is high. This is due to the unequal quantity of relevant jurisprudence that has been produced by different regional institutions, together with the fact that the regional human rights courts that exist do not represent all parts of the world. The risk is, however, one that can be addressed by judges in several ways. The first is by referring to a range of regional institutions whenever it is possible and appropriate to do so.<sup>20</sup> This can help to show that particular approaches or points of reasoning are not regionally specific, but

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<sup>17</sup> Simma, “Universality of International Law from the Perspective of a Practitioner” (2009) 20(2) *European Journal of International Law* 265, at 279.

<sup>18</sup> Dothan, “How International Courts Enhance Their Legitimacy” (2013) 14 *Theoretical Inquiries in Law* 455, at 471.

<sup>19</sup> Dupre, “Globalisation and Judicial Reasoning: Building Blocks for a Method of Interpretation” in Halpin and Roeben, *Theorising the Global Legal Order* (2009) at 115; Sheppard, “The International Criminal Court and ‘Internationally Recognized Human Rights’: Understanding Article 21(3) of the Rome Statute” (2010) 20 *International Criminal Law Review* 43, at 53-54.

<sup>20</sup> Young, “Internationally Recognized Human Rights’ Before the International Criminal Court” (2011) 60(1) *International and Comparative Law Quarterly* 189, at 205.



supported by the practice of different regional systems. Secondly, and similarly, judges can supplement reference to regional institutions with references to the output of international human rights treaty bodies, such as the United Nations Human Rights Committee. Whilst such mechanisms are not judicial bodies, and questions can be raised as to the authority of their outputs,<sup>21</sup> reference to them may help to show that approaches adopted by regional human rights courts are not regionally specific and have international support.

Whilst the measures outlined above may help to reduce concerns about cultural bias in some instances, it may not always be possible for the judges of the ICC to draw from other international and regional mechanisms. Consequently, a third measure is vital. The judges of the ICC must provide clear reasoning as to how regional case law is being used in the Court's reasoning and how reference to it fits with the ICC's rules of applicable law and interpretation.<sup>22</sup> In doing so, the judges of the ICC can show that regional human rights jurisprudence is not being relied upon as a source of law in its own right, but as a means of identifying the sources of law that judges of the ICC have the authority to apply.

### **E. The Rights of the Accused**

A second concern relating to the Court's use of regional human rights jurisprudence is its implications for the rights of the accused. This risk flows from the differing functions of the ICC and regional human rights courts, the former being concerned with the criminal responsibility of individuals and the latter concerned with the civil responsibility of States. These functional differences necessitate distinctions in the applicable law of the ICC and human rights courts, as well as the methods of reasoning that they employ.

It has been argued elsewhere that expansive interpretive techniques and methods of reasoning that have been developed to enhance the rights of victims in the field of human rights law are not easily reconciled with liberal principles of criminal justice and can undermine the rights of the accused if transferred into the field of international criminal law.<sup>23</sup> A key concern is that reference to human rights jurisprudence may serve to expand the scope of criminal liability and violate the principle of legality, which protects individual from being held criminally responsible for conduct that was not criminalised at the time of commission.<sup>24</sup>

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<sup>21</sup> See discussion in Croquet, *supra* n 4, at 127-28.

<sup>22</sup> Young, *supra* n 20, at 206.

<sup>23</sup> See generally Robinson, "The Identity Crisis of International Criminal Law" (2008) 21 *Leiden Journal of International Law* 925; Grover, "A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court" (2010) 21(3) *European Journal of International Law* 543, at 550-51.

<sup>24</sup> For discussion of the meaning and scope of the principle of legality in the international criminal context, and its compatibility with progressive development, see Shahabuddeen, "Does the Principle

Concerns about the impact of the ICC's engagement with human rights law on the rights of the accused are not confined to the interpretation and application of the substantive law of the ICC. Reference to human rights law in the determination of procedural issues could also have implications for the rights of the accused. This is particularly so when balancing the interests of victims with the rights of the accused in proceedings before the Court. The tension between the interests of these two stakeholders in the ICC's proceedings is reflected in the provisions of the Rome Statute. The text of Article 68(3) of the Rome Statute, for example, recognises the tension between the interests of victims and the rights of the accused in the area of victim participation and emphasises the priority that must be accorded to the latter.

The risk that reference to regional human rights jurisprudence could be used to expand the scope of criminal liability and support the procedural rights of the victims to the detriment of the accused again highlights the importance of clear reasoning on the part of judges. To counter the risk of unfairness, it is important that judges demonstrate awareness of the different functions of the ICC and regional human rights courts in their reasoning, ensure compliance with the ICC's provisions on fair trial standards,<sup>25</sup> and provide a clear explanation of how human rights jurisprudence is being used so as to allow the defence to make effective challenges where the rights of the accused are at stake. As with the risk of cultural bias, the risk of interference with the rights of the accused, whilst significant, can be countered through the adoption of clear judicial reasoning aware of the differing functions of the ICC and regional human rights courts.

### 3. THE LEGAL FRAMEWORK

The importance of clear judicial reasoning is enhanced by the ambiguous role given to human rights jurisprudence under the Court's legal framework. The only reference to judicial decisions in the Rome Statute is found in Article 21(2), which allows the Court to "apply principles and rules of law as interpreted in its [own] previous decisions". Nonetheless, reference to external jurisprudence, including the decisions of regional human rights courts, can be "read in" to the ICC's rules of applicable law and interpretation. The key provision here is Article 21 of the Rome Statute, which outlines the Court's sources of applicable law.

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of Legality Stand in the Way of Progressive Development of Law?" (2004) 2 *Journal of International Criminal Justice* 1007, at 1012. Cassese, *The Influence of European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks* in Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff Publishers, 2003), at 49.

<sup>25</sup> These include Articles 22-24, 66 and 67 of the Rome Statute.

### A. Article 21(1) of the Rome Statute

Article 21(1) of the Rome Statute outlines the source of law that the ICC “shall apply”, namely:

- (a) “In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”.

Article 21(1) provides a number of possible openings for reference to regional human rights jurisprudence. The first openings are found in paragraph (a). Given the synergies that exist between international criminal law and human rights law, the decisions of regional human rights courts offer an obvious point of reference in the interpretation of the Court’s primary documents, namely the Rome Statute, the ICC’s Elements of Crimes and its Rules of Procedure and Evidence.

As an international treaty, the Rome Statute is subject to the rules of treaty interpretation outlined in the Vienna Convention on the Law of Treaties (1969) (Vienna Convention).<sup>26</sup> Reference to regional human rights jurisprudence can be read into different elements of the Vienna rules. It can be read into the “general rule of interpretation” set out in Article 31(1) of the Vienna Convention, which centres around the ordinary meaning of the terms of the treaty.<sup>27</sup> The decisions of regional human rights courts could be used to ascertain the ordinary “functional” meaning of particular terms in the Rome Statute, or the meaning and scope of “generic terms”, which are intended to keep pace with the development of international law.<sup>28</sup>

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<sup>26</sup> Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Article 5. The Appeals Chamber of the ICC has endorsed the application of the rules of interpretation contained in Articles 31-32 of the VCLT in the interpretation of the Rome Statute. See *Situation in the Democratic Republic of the Congo* ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006, para 33.

<sup>27</sup> Article 31(1) of the Vienna Convention provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

<sup>28</sup> For discussion of the “functional meaning” of treaty terms and “generic terms”, see Gardiner, *Treaty Interpretation* (2008) at 166-67 and 172-73.

Another opening lies in Article 31(3)(c) of the Vienna Convention, which requires the interpreter to take into account “[a]ny relevant rules of international law applicable in relations between the parties”. This provision has been understood to incorporate a general principle of “systemic integration” into the Vienna regime, providing “express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law”.<sup>29</sup> Whilst regional human rights jurisprudence, or even the regional human rights treaties that it relates to, cannot be considered to be “rules of international law applicable in relations between the parties” *per se*,<sup>30</sup> such jurisprudence could offer assistance in the identification of customary international law or general principles of law, which would fall within the scope of Article 31(3)(c).

It is important to note that the rules of interpretation outlined in Articles 31-33 of the Vienna Convention are not exhaustive. Other interpretive techniques, which may be employed alongside the Vienna rules, could create further openings for reference to regional human rights jurisprudence. The principle of effectiveness and the evolutive approach to treaty interpretation have, for example, been described as “powerful techniques for the harmonization of legal regimes” and may entail reference to external case law.<sup>31</sup>

In addition to the above, regional human rights case law may be used to assist in the identification of the sources of law referred to in Articles 21(1)(b) and (c) of the Rome Statute. These sources of law can be applied in the event that the issue at hand cannot be resolved by reference to the sources listed in Article 21(1)(a). Regional human rights jurisprudence may provide a valuable source of assistance when identifying “principles and rules of international law”, referred to in Article 21(1)(b) of the Rome Statute. Whilst there has been some disagreement as to the meaning and scope of this phrase, it is generally understood to encompass, at a minimum, rules of customary international law.<sup>32</sup> Regional human rights jurisprudence may assist in the identification of customary rules. Indeed,

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<sup>29</sup> McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 *International and Comparative Law Quarterly* 279, at 280-81.

<sup>30</sup> It is unclear whether the “parties” referred to in Article 31(3)(c) of the Vienna Convention constitute the parties to the relevant treaty or to the particular dispute. See discussion in Pauwelyn, *Conflict of Norms in Public International Law* (2003) at 257-63. Linderfalk, “Who are ‘the Parties’? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited” (2008) *Netherlands International Law Review* 343. The issue is complicated further in the context of the ICC because the parties are not States, but individuals accused of having committed international crimes and the Prosecutor of the ICC.

<sup>31</sup> Brown, *A Common Law of International Adjudication* (2007) at 12 and 43-48.

<sup>32</sup> Pellet, “Applicable Law” in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008) at 1071. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) at 391. McAuliffe deGuzman, “Article 21: Applicable Law” in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008) at 707-708.

judges of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda have referred to regional human rights jurisprudence for this purpose.<sup>33</sup>

The reference to “applicable treaties” in Article 21(1)(b) could offer a further basis for reference to case law that elaborates on the relevant treaty provisions. Whilst some commentators have considered the term “applicable treaties” to embrace regional human rights treaties,<sup>34</sup> questions can be raised as to the extent to which such treaties can be understood to be “applicable” in the context of the ICC.<sup>35</sup>

Lastly, decisions of regional human rights courts may be referred to in the identification of “general principles of law derived... from national laws of legal systems of the world”, referred to in Article 21(1)(c) of the Rome Statute. Decisions of regional human rights institutions that include comparative surveys of domestic law and different legal systems may be particularly useful. The reference to “national laws of legal systems of the world” could also allow, implicitly, for reference to regional human rights jurisprudence in situations where the national legal systems decide cases in accordance with the jurisprudence of regional human rights mechanisms.

## **B. Article 21(3) of the Rome Statute**

A further opening for reference to regional human rights jurisprudence lies in Article 21(3) of the Rome Statute, which requires that “[t]he application and interpretation of law pursuant to [Article 21] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.

At first sight, this provision seems to provide a firm foundation for reference to regional human rights jurisprudence. However, the relevance of *regional* human rights jurisprudence in the identification of *internationally* recognised human rights can be disputed. Whilst, on the one hand, regional human rights courts can be seen as interpreters of internationally recognised human rights, it cannot be ignored that they operate in a regional context and apply law that contains regional variations.<sup>36</sup> Neither the Rome Statute, nor its *travaux préparatoires*, offer guidance as to how “internationally recognised human rights” are to be

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<sup>33</sup> Schabas, “Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights” (2011) 9 *Journal of International Criminal Justice* 609, at 625-26, citing *Barayagwiza* ICTR 97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para 40.

<sup>34</sup> Degan, “On the Sources of International Criminal Law” (2005) 4 *Chinese Journal of International Law* 45, at 80.

<sup>35</sup> For discussion on this point, see Hochmayr, “Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute” (2014) 12 *Journal of International Criminal Justice* 655, at 666-67.

<sup>36</sup> See *supra* n 19.

identified and what role regional human rights jurisprudence can and should play in the process.<sup>37</sup> The issue is, consequently, one that must be resolved by the judges of the Court.

Another controversy surrounding Article 21(3) concerns its impact on the application of the sources of law outlined in Article 21(1) of the Rome Statute. It is unclear whether the provision merely serves as guidance in the interpretation of the Rome Statute, or if it can also act as a basis to fill gaps in the Statute, or even to override the statutory text.<sup>38</sup> Again, little assistance can be drawn from the text of the Rome Statute or the *travaux préparatoires* and has been left for resolution by the ICC's judges. If Article 21(3) is understood to provide a basis to add new obligations or powers to the Rome Statute, or to override the text of the Rome Statute, it could provide a very powerful role for regional human rights jurisprudence at the ICC.

Whilst the legal framework of the ICC provides numerous openings for reference to regional human rights jurisprudence, their scope and significance remain uncertain. Significant ambiguities surround the interpretation of Article 21(3) and its implications for the Court's reference to regional human rights jurisprudence. In order to set the relationship between the ICC and regional human rights courts on a firmer footing, it will be necessary for the judges of the ICC to develop a clear and consistent approach to the interpretation of Article 21 of the Rome Statute and, in doing so, clarify the role of regional human rights jurisprudence in judicial decision-making at the ICC.

#### 4. REGIONAL HUMAN RIGHTS JURISPRUDENCE AND THE *LUBANGA* CASE

The conclusion of the ICC's proceedings in the *Lubanga* case provides the first opportunity to review the Court's approach to regional human rights jurisprudence throughout the course of its proceedings in a complete case. Analysis of the 595 English language decisions produced by the ICC in the *Lubanga* case highlights the pervasiveness of reference to regional human rights jurisprudence throughout the pre-trial and trial process at the ICC, in relation to a range of legal issues. It also reveals a lack of clarity as to the Court's methodology for referring to and drawing from this body of case law. The analysis in this section provides a basis to discuss the implications of the Court's approach in Sections 5.

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<sup>37</sup> The debate surrounding Article 21(3) during the negotiations in Rome centred on the desirability of specifying prohibited grounds of discrimination and the use of the term "gender". See McAuliffe deGuzman, *supra* n 32, at 711-12.

<sup>38</sup> For discussion see Akande, "Sources of International Criminal Law" in Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, 2009) at 47-47. Pellet, *supra* n 39, at 1080. Hafner and Binder, "The Interpretation of Article 21(3) ICC Statute: Opinion Reviewed" (2004) 9 *Austrian Review of International and European Law* 163, at 173-76.

### A. Frequency of Reference

One of the most striking results of the content analysis is the frequency with which the judges of the ICC have referred to regional human rights jurisprudence in the *Lubanga* case. The chart below shows the range of institutions that the judges of the ICC referred to in Court's proceedings and the number of references that the judges made to each institution.<sup>39</sup>

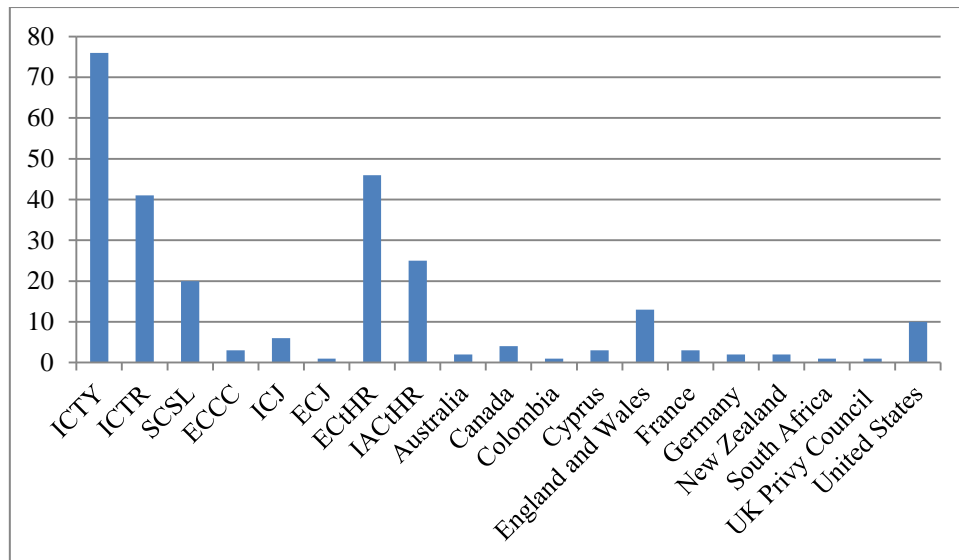


Fig. 1: Institutions Referred to by the Chambers of the ICC in the *Lubanga* Case

The information in the chart does not indicate why judges have turned to regional human rights jurisprudence, or how it has been used in judicial reasoning at the ICC. These issues are addressed separately in subsections below.<sup>40</sup> Its significance lies in highlighting the prevalence of references to the decisions of regional human rights courts vis-à-vis other international, regional and domestic institutions. The number of references to the ECtHR was second only to the number of references to the International Criminal Tribunal for the Former Yugoslavia (ICTY), one of the Court's predecessors. The IACtHR was the fourth most frequently referred-to institution, with the International Criminal Tribunal for Rwanda (ICTR) in third place. References to these institutions exceeded, by far, the number of references to the International Court of Justice (ICJ), the European Court of Justice (ECJ) and a range of domestic courts and tribunals, shown on the right hand side of the chart.

<sup>39</sup> For the purposes of quantifying reference to human rights jurisprudence, each of the 595 decisions included in the study was examined for reference to the decisions of regional human rights courts. Reference to several decisions from the same institutions, or the same decision repeatedly, was treated as one citation where the reference concerned the same legal issue. If it was unclear whether or not the matter being addressed should be treated as one issue or two separate issues, it was presumed that there were two.

<sup>40</sup> See below at Sections 4.B and 4.D.

References to regional human rights jurisprudence spanned all three judicial divisions of the Court. This shows that the practice was not specific to individual judges of the ICC and represents a widespread practice within the Court. In total, 38% of the Pre-Trial Chamber's references to external jurisprudence were to decisions of regional human rights courts. The equivalent figures for the Trial and Appeals Chambers are 32% and 16%, respectively. The Pre-Trial Chamber referred to regional human rights jurisprudence as frequently as it did to the case law of the two *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda (a total of 23 references).

It is important to note that the frequency of reference to external jurisprudence, including the decisions of human rights courts, in the judicial decision-making process could be higher than suggested by the information on the chart, which only relates to instances of cross-referencing that are expressly cited in the Court's decisions.

### **B. Factors Influencing the Court's Reference to Regional Human Rights Jurisprudence**

The ICC's case law in the *Lubanga* case reveals two factors that have influenced the frequency of reference to regional human rights jurisprudence, namely the prior experience of the judges of the ICC and the interpretation of Article 21(3) of the Rome Statute.

The impact of judicial background is apparent from a partly dissenting opinion of Judge Pikis to a decision of the Appeals Chamber in January 2008.<sup>41</sup> In his partly dissenting opinion, Judge Pikis explained his reasons for following the majority's interpretation of one of the issues under appeal. He explained that he had already confronted a similar issue in the case of *Andronicou and Constantinou v. Cyprus* before the ECtHR, where he had served as an *ad hoc* judge. Having noted his reasoning in that case, he concluded that "[t]he same holds true in the present proceedings".<sup>42</sup> The opinion provides a clear example of the transfer of legal reasoning through the movement of judges between judicial institutions. Just as judicial background has influenced reference to regional human rights jurisprudence, so too may the background of other staff within the ICC, including counsel for the prosecution and defence, victims legal representatives and legal officers within the Court's Chambers.

The decisions of the ICC also suggest that the high frequency of reference to regional human rights jurisprudence in the *Lubanga* case has been supported by the understanding that Article 21(3) provides not only a legal basis, but also a requirement for judges to take

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<sup>41</sup> *Lubanga* ICC-01/04-01/06-1433, Judgment on the Appeal of Mr Lubanga Dyilo Against the Oral Decision of Trial Chamber I of 18 January 2008, Appeals Chamber, Partly Dissenting Opinion of Judge Georgios M. Pikis, 11 June 2008, para 3.

<sup>42</sup> *Ibid*, para 3. Judge Pikis cited ECtHR, *Andronicou and Constantinou v. Cyprus* Application No. 86/1996/705/897, Judgment of 9 October 1997, in which he had acted as an *ad hoc* Judge.



regional human rights law into consideration in the interpretation of the Rome Statute. The language of a number of the Court's decisions in the *Lubanga* case reflects this understanding. One example can be found in an early decision of the Pre-Trial Chamber, which considered the materials to be submitted by the Prosecutor in support of an application for a warrant of arrest.<sup>43</sup> Having emphasized that the Chamber "[would] not take any decision limiting [the right to liberty] on the basis of applications where key factual allegations [were] fully unsupported", the Chamber went on to say that:

*"As required by article 21(3) of the Statute, the Chamber considers this to be the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the European Convention on Human Rights and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the American Convention of Human Rights".*<sup>44</sup>

The quotation above suggests that Article 21(3) encompasses an obligation to interpret the Rome Statute in accordance with regional human rights law. In its footnotes, the Chamber noted decisions of the ECtHR and IACtHR relating to the relevant provisions of the European Convention on Human Rights and the American Convention on Human Rights.

Another example can be found in the Separate Opinion of Judge Song to a decision of the Appeals Chamber concerning the participation of victims in appeals proceedings before the Court.<sup>45</sup> Having highlighted that "[T]he interest of victims that justice is done also is recognized in the jurisprudence of the [IACtHR and the ECtHR]", Judge Song argued that "[t]his jurisprudence should be taken into account when interpreting the term 'personal interests of the victims' in article 68(3) of the Statute, *as article 21(3) of the Statute obliges the Court to interpret and apply the Statute in consistence with internationally recognized human rights*".<sup>46</sup> Again, here, a connection is drawn between regional human rights jurisprudence and the obligation in Article 21(3) of the Rome Statute to interpret the Statute in accordance with internationally recognised human rights.

In neither decision did the judges explain how the obligation to interpret and apply the provisions of the Rome Statute in a manner that is consistent with internationally recognised human rights gave rise to an obligation to take regional human rights law into account.

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<sup>43</sup> *Lubanga* ICC-01/04-01/06-8, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para 12.

<sup>44</sup> *Ibid.* Emphasis added.

<sup>45</sup> On this point, see also *Lubanga* ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, Separate Opinion of Judge Sang-Hyun Song, Appeals Chamber, 13 June 2007.

<sup>46</sup> *Ibid.*, paras 14-16. Emphasis added.

### C. The Subject Matter of the References

Analysis of the Court's decisions in the *Lubanga* case indicates that the judges of the ICC did not refer to regional human rights jurisprudence when interpreting the relevant crimes and modes of liability. This is perhaps due to the nature of the offences that were being addressed: the conscription, enlistment and use of child soldiers rather than torture or inhuman and degrading treatment, which have been more frequently addressed by human rights courts. Reference was, however, made to the case law of the ECtHR when considering the interpretation of the substantive law of the ICC. In its final judgment, the Trial Chamber acknowledged case law the ECtHR, which had been relied upon by the Defence, to the effect that "a criminal offence must be clearly defined in the relevant laws, and the criminal law should not be broadly interpreted to an accused's detriment".<sup>47</sup>

Reference to regional human rights jurisprudence was far more pervasive in the Court's reasoning on matters of procedure and evidence. Indeed, the decisions of regional human rights courts were referred to in addressing some of the most significant procedural challenges raised in the *Lubanga* case, namely the consequences of the failure of the Office of the Prosecutor to disclose potentially exculpatory material obtained under confidentiality agreements to the defence,<sup>48</sup> and the ability of the Trial Chamber to change the legal characterisation of the facts under Regulation 55(2) of the Regulations of the Court.<sup>49</sup>

Other issues that prompted the judges of the ICC to turn to regional human rights jurisprudence in the *Lubanga* case include the disclosure of material prior to the hearing on the confirmation of the charges,<sup>50</sup> the standard of proof to be met by the Prosecutor in order

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<sup>47</sup> *Lubanga* ICC-01/04-01/06-2842, supra n 5, para 581.

<sup>48</sup> *Lubanga* ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008, paras 77-81; *Lubanga* ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled 'Decision on the Consequences of Non-Disclosure of Exculpatory materials covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, Appeals Chamber, 21 October 2008, para 46.

<sup>49</sup> *Lubanga* ICC-01/04-01/06-2069, Second Corrigendum to "Minority Opinion on the "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009, Trial Chamber I, 31 July 2009, paras 23-26; *Lubanga* ICC-01/04-01/06-2205, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice To The Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court', Appeals Chamber, 8 December 2009, para 87.

<sup>50</sup> *Lubanga* ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, Pre-Trial Chamber I, 15 May 2006, para 14.

to confirm the charges against the accused,<sup>51</sup> compliance with the principle of legality in the interpretation of the Rome Statute,<sup>52</sup> the implications of illegality in the arrest proceedings at the domestic level for subsequent proceedings before the ICC,<sup>53</sup> the admissibility of evidence obtained during an unlawful search and seizure,<sup>54</sup> and the use of anonymous witnesses in trial proceedings.<sup>55</sup>

In relation to each of the issues listed above, regional human rights case law was used to find a solution to procedural issues that had implications for the rights of the accused. It should be noted that the case law of regional human rights courts has not always led the judges of the ICC to rule in favour of the accused. For example, when rejecting the submission of the Defence that “anything short of full Defence access to the Prosecution’s file would infringe upon Thomas Lubanga Dyilo’s right to a fair trial”, the Pre-Trial Chamber supported its reasoning with reference to the case law of the ECtHR.<sup>56</sup>

Regional human rights jurisprudence has been referred to in the *Lubanga* case not only to consider the meaning and scope of the rights of the accused, but also to determine the rights accorded to victims in the criminal justice process. In its decision establishing the principles and procedures to be applied to reparations, for example, the Trial Chamber of the ICC recognised the “substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations” and confirmed that it had “taken into account the jurisprudence of regional human rights courts and the national and international mechanisms and practices that have been developed in this field”.<sup>57</sup>

Regional human rights jurisprudence was also referred to in the *Lubanga* case when considering the right of victims to participate in the Court’s proceedings.<sup>58</sup> In June 2007, the Appeals Chamber was called upon to address the question of whether or not the Victims Legal Representatives could participate in appeal proceedings relating to the Pre-Trial Chamber’s decision to confirm the charges against the accused. The majority of the judges in the Appeals Chamber held that the victims had not demonstrated that their personal interests were affected by the issue, as required by Article 68(3) of the Rome Statute, thus precluding their participation in the issue being addressed. The reference to regional human

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<sup>51</sup> *Lubanga* ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para 38.

<sup>52</sup> *Lubanga* ICC-01/04-01/06-2842, supra n 5, para 581.

<sup>53</sup> *Lubanga* ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, Pre-Trial Chamber I, 3 October 2006, at 6-10.

<sup>54</sup> *Lubanga* ICC-01/04-01/06-1981, Decision on the Admission of Material from the ‘Bar Table’, Trial Chamber I, 24 June 2009, paras 22-27.

<sup>55</sup> *Lubanga* ICC-01/06-01/04-1119, Decision on Victims’ Participation, Trial Chamber I, 18 January 2008, para 78.

<sup>56</sup> *Lubanga* ICC-01/04-01/06-102, supra n 50, para 3.

<sup>57</sup> *Lubanga* ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber, 7 August 2012, para 186

<sup>58</sup> *Lubanga* ICC-01/04-01/06-925, supra n 45, para 4.

rights jurisprudence is found in the aforementioned Separate Opinion of Judge Song, who noted the relevance of the jurisprudence of the IACtHR and ECtHR on the issue:

“The interest of victims that justice is done also is recognized in the jurisprudence of the Inter-American Court of Human Rights (IACHR) and of the European Court of Human Rights (ECHR)... While this jurisprudence does not stipulate that victims have a human right to participate in criminal proceedings, the findings of the IACHR and of the ECHR emphasize that victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and that this interest is protected by human rights norms. This jurisprudence should be taken into account when interpreting the term ‘personal interests of the victims’ in article 68(3) of the Statute, as article 21(3) of the Statute obliges the Court to interpret and apply the Statute in consistence with internationally recognized human rights”.<sup>59</sup>

The tendency of the judges of the ICC to draw from regional human rights jurisprudence when addressing the rights of victims in the criminal justice process indicates that the practice may feed into a key tension underpinning international criminal law: the tension between the rights of the accused, on the one hand, and the interests of victims and communities affected by the commission of international crimes, on the other. The implications of this practice will be considered further in Section 5.

#### **D. Use of Regional Human Rights Jurisprudence**

The sections below highlight four different uses of the jurisprudence, which can be observed in the ICC’s decisions in the *Lubanga* case. These uses indicate the impact that the regional human rights jurisprudence has had on the Court’s reasoning.

- (i) *Recognition of the overlap between regional human rights law and the provisions of the Rome Statute*

On a number of occasions, the judges of the ICC have referred to the decisions of regional human rights courts simply to recognise the overlap that exists between the provisions of the Rome Statute and human rights law. An example can be found in a decision of the Pre-Trial Chamber in 2006, where the Court addressed the interpretation of Article 57(3)(e) of the Rome Statute, which allows the Pre-Trial Chamber of the ICC to seek the cooperation of States in taking protective measures for the purpose of securing the enforcement of a future reparation award.<sup>60</sup> Having noted the importance of reparations at the Court, the Chamber included a footnote citing regional human rights jurisprudence as evidence of the fact that “[r]eparations to victims of gross violations of human rights in the context of State

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<sup>59</sup> *Ibid*, paras 14 and 16.

<sup>60</sup> *Lubanga* ICC-01/04-01/06-8, *supra* n 43, para 136.

responsibility has since long been a key component of human rights bodies”.<sup>61</sup> The Chamber did not suggest that the case law had affected the Court’s reasoning on the issue at hand. The reference merely provided context for the Court’s decision.

Similarly, when discussing the right of the defendant not to incriminate himself during an investigation by the ICC, outlined in Article 55(1)(a) of the Rome Statute, the Trial Chamber recognised that “[t]he ECtHR has concluded that the right for an accused not to incriminate himself constitutes part of the right to a fair trial”: a right that the Chamber recognised had been firmly incorporated into the Rome Statute under Article 55(1)(a).<sup>62</sup> Again, the reference did not appear to add to the Court’s reasoning in any way, it merely recognised the synergy between Article 55(1)(a) of the Rome Statute and regional human rights law.

(ii) *Support for Conclusions Already Reached*

The most frequent use of regional human rights jurisprudence in the *Lubanga* case was to reinforce the conclusions that the judges of the ICC had already reached on other grounds.

The judges of the ICC have frequently supported their conclusions or points of reasoning simply with footnotes containing relevant regional human rights jurisprudence. On occasion, they have stressed that the conclusions that they have arrived at are supported by, or consistent with, the case law of regional human rights courts in their reasoning. An example of the latter can be found in a decision of the Appeals Chamber concerning the failure of the Prosecutor to disclose potentially exculpatory material received under Article 54(3)(e) confidentiality agreements. The Appeals Chamber agreed with the conclusion of the Trial Chamber that the final assessment as to whether or not material in the possession of the Prosecutor must be disclosed is to be carried out by the Trial Chamber.<sup>63</sup> In drawing this conclusion, the Chamber observed that the approach of the Trial Chamber is “confirmed by the jurisprudence of the ECHR, to which the Trial Chamber referred”.<sup>64</sup>

Another example can be found in the decision of the Judge Steiner, acting as Single Judge of the Pre-Trial Chamber, concerning the disclosure of the identity of prosecution witnesses for the purpose of the confirmation of charges hearing.<sup>65</sup> Having outlined her interpretation of the relevant statutory provisions, Judge Steiner noted that she considered her interpretation to be “fully consistent with the jurisprudence of the [ECtHR]”.<sup>66</sup> Again, the decision suggests

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<sup>61</sup> *Ibid*, para 136.

<sup>62</sup> *Lubanga* ICC-01/04-01/06-2192, Redacted Second Decision on Disclosure by the Defence and Decision on Whether the Prosecution May Contact Defence Witnesses, Trial Chamber I, 20 January 2010, para 68.

<sup>63</sup> *Lubanga* ICC-01/04-01/06-1486, *supra* n 48, para 46.

<sup>64</sup> *Ibid*, para 46.

<sup>65</sup> *Lubanga* ICC-01/04-01/06-108-Corr, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, Pre-Trial Chamber I, 19 May 2006, para 32.

<sup>66</sup> *Ibid*, para 32.

that regional human rights jurisprudence was referred to in order to confirm an interpretation of the Rome Statute that had already been arrived at.

At times, the judges of the ICC have highlighted that their reasoning is consistent not only with the decisions of regional human rights courts, but also other international criminal tribunals and domestic criminal courts. For example, when addressing the failure of the Prosecutor to disclose potentially exculpatory materials covered by Article 54(3)(e) agreements, the Trial Chamber noted that its finding that the right to fair trial includes an entitlement to disclosure of exculpatory materials “is established not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence, and particularly that of the European Court of Human Rights and the ICTY”.<sup>67</sup> It is worth noting that the decisions of the ECtHR that the Trial Chamber referred to went beyond those referred to in the relevant case law of the ICTY, suggesting that the judges of the ICC had reviewed the decisions of both institutions independently, rather than drawing references to regional human rights case law directly from the decisions of the ICTY. This is significant insofar as it reflects a conscious decision to draw from regional human rights jurisprudence alongside the case law of international criminal courts and tribunals.

(iii) *Clarification of Concepts Found in the Rome Statute*

In a small number of decisions, the judges of the ICC have indicated that they have relied upon the decisions of regional human rights courts to elaborate upon key concepts found in the Rome Statute. These decisions indicate a more significant role for regional human rights jurisprudence than confirmation of conclusions reached by other means.

One instance where the judges of the ICC have acknowledged the impact of regional human rights jurisprudence on their reasoning can be found in the Pre-Trial Chamber’s decision on the confirmation of charges, where the Chamber defined the standard of proof to be met by the Prosecutor for the purpose of the confirmation of charges hearing. In its decision, the Pre-Trial Chamber explained that it had “relie[d] on internationally recognized human rights jurisprudence” to define the concept of “substantial grounds to believe” in Article 61(7) of the Rome Statute.<sup>68</sup> The Chamber went on to highlight several decisions of the ECtHR where the Court had considered the meaning and scope of the same phrase. The wording of the decision suggests that the Court’s interpretation of Article 61(7) was based largely, if not wholly, on the case law of the ECtHR. No other reasoning was given to support the Chamber’s approach. A reference was, however, made to a report of the UN Committee against Torture to support the proposition that “the purpose of the confirmation

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<sup>67</sup> *Lubanga* ICC-01/04-01/06-1401, supra n 48, para 77.

<sup>68</sup> *Lubanga* ICC-01/04-01/06-803, supra n 51, para 38.

hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought”.<sup>69</sup>

In a decision of the Pre-Trial Chamber in 2006, regional human rights jurisprudence was also presented as the sole basis for the reasoning of the Pre-Trial Chamber’s conclusion that the right to be present at the confirmation hearing under Article 61(1) and 2(a) of the Rome Statute “extends, in principle, to all proceedings from the initial appearance to the confirmation hearing”.<sup>70</sup> The only reasoning given to support the conclusion of the chamber is a footnote referring to Article 6(1) of the European Convention on Human Rights and a decision of the ECtHR in which the judges had held that the provision applies throughout the entirety of the proceedings.<sup>71</sup>

A further example can be taken from the decision of the Trial Chamber on the principles and procedures to be applied to reparations. In its decision, the Trial Chamber referred to regional human rights jurisprudence to support a number of conclusions on the modalities and scope of reparations. Decisions of the IACtHR were referred to, for example, to support the proposition that “[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently”, that “[r]estitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed” and that “[t]he conviction and sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities”.<sup>72</sup> Each of these conclusions was supported solely by reference to case law of the IACtHR.

(iv) *To Fill Gaps in the Rome Statute*

In most instances where the judges of the ICC have referred to decisions of regional human rights courts in the *Lubanga* proceedings, the case law has been used to assist in the interpretation of provisions of the Rome Statute, or to confirm interpretations of the statutory text. On one occasion, however, the Chambers of the ICC considered case law from the ECtHR in determining the applicability of a doctrine that is not referred to in the Rome Statute, or the Court’s Rules of Procedure and Evidence: the doctrine of abuse of process.<sup>73</sup>

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<sup>69</sup> *Ibid*, para 38. Cites United Nations High Commission for Human Rights, *Report of the Committee against Torture*, United Nations Document, A/53/44, Annex IX, para. 6.

<sup>70</sup> *Lubanga* ICC-01/04-01/06-108, *supra* n 65, para 8.

<sup>71</sup> *Ibid*, footnote 9.

<sup>72</sup> *Lubanga* ICC-01/04-01/05-2904, *supra* n 57, paras 220, 223 and 237, respectively.

<sup>73</sup> The Appeals Chamber of the ICC has described the doctrine as “a principle evolved by English case law constituting a feature of the common law adopted in many countries where this system of law finds application”. See *Lubanga* ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Rome Statute of 3 October 2006 , Appeals Chamber, 14 December 2006, para 26.

The applicability of the doctrine was initially considered following the attempt of Mr. Thomas Lubanga Dyilo to challenge the jurisdiction of the Court under Article 19(2) of the Rome Statute on the basis that he had been unlawfully detained and ill-treated by Congolese authorities prior to his arrest under the warrant of the ICC. The Pre-Trial Chamber recognised that the abuse of process doctrine “constitutes an additional guarantee of the rights of the accused” even when there is no concerted action between the Court and the authorities of the custodial State.<sup>74</sup> It found, however, that the application of the doctrine had been “confined to instances of torture or serious mistreatment by national authorities” in connection with the arrest and transfer of the accused, with reference to the case law of the *ad hoc* tribunals.<sup>75</sup> Since the issues in the *Lubanga* case did not relate to torture or serious mistreatment, and there was no evidence of concerted action between the ICC and the authorities in the Democratic Republic of the Congo, the Pre-Trial Chamber ultimately dismissed the challenge.

Mr. Thomas Lubanga Dyilo appealed the decision of the Pre-Trial Chamber. In a judgment in 2006, the Appeals Chamber found that the doctrine of abuse of process could not be applied under Article 21(1) of the Rome Statute since the Rome Statute addressed the grounds for the relinquishment of the Court’s jurisdiction exhaustively in Article 17.<sup>76</sup> The Chamber went on to recognize, however, that the doctrine of abuse of process had “a human rights dimension” and considered the scope for application under Article 21(3) of the Rome Statute.<sup>77</sup> The Chamber found that:

“Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”.<sup>78</sup>

Consequently,

“Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped”.<sup>79</sup>

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<sup>74</sup> *Ibid*, para 10.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*, para 34.

<sup>77</sup> *Ibid*, para 36.

<sup>78</sup> *Ibid*, para 37.

<sup>79</sup> *Ibid*, para 37.



The Chamber cited case law from the ECtHR to the effect that serious breaches of the rights of the accused by investigating authorities could render a fair trial impossible.<sup>80</sup> It concluded, however, that there was no error in the findings of the Pre-Trial Chamber. The Chamber had rightly found that breaches of the rights of the suspect or the accused “may provide ground for halting the process”, but that “none was shown”.<sup>81</sup> It was not long, however, before the Trial Chamber imposed the first stay of proceedings, in June 2008, due to the Prosecutor’s failure to disclose potentially exculpatory material covered by confidentiality agreements concluded pursuant to Article 54(3)(e).<sup>82</sup> A further stay of proceedings was imposed in July 2010, in response to the Prosecutor’s refusal to comply with orders of the Trial Chamber regarding the disclosure of the identity of an intermediary.<sup>83</sup>

The Court’s case law on the stay of proceedings for abuse of process confirms that Article 21(3) of the Rome Statute provides not only a rule of interpretation, but also a basis to incorporate new doctrines or principles, and consequently new powers, into the ICC’s procedural framework. More importantly, in the present context, it shows that regional human rights jurisprudence can play a role in supporting the Court’s reasoning to this end.

#### **E. The Legal Basis for Reference to Regional Human Rights Jurisprudence**

Putting aside occasional references to Article 21(3) of the Rome Statute, the judges of the ICC have rarely explained the legal basis for their reference to regional human rights jurisprudence in the *Lubanga* case. The decisions of regional human rights courts have frequently been cited to support an aspect of the Court’s reasoning or to help resolve a legal issue without any indication of how the reference fits within the ICC’s rules of applicable law and interpretation, or the weight that it has been given.<sup>84</sup>

Where the judges have drawn a connection between reference to regional human rights jurisprudence and Article 21(3) of the Rome Statute, they have not explained what role regional human rights jurisprudence has played in the identification of internationally recognised human rights referred to in the Article’s text.<sup>85</sup> This is the case even where the judges have relied on Article 21(3) of the Rome Statute to incorporate a new power – to stay proceedings for abuse of process – into the ICC’s system of justice.

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<sup>80</sup> *Ibid*, para 38.

<sup>81</sup> *Ibid*, para 44.

<sup>82</sup> *Lubanga* ICC-01/04-01/06-1401, *supra* n 48.

<sup>83</sup> *Lubanga* ICC-01/04-01/06-2517, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, 8 July 2010.

<sup>84</sup> This practice has also been observed in other studies on the ICC’s use of regional human rights jurisprudence. See Croquet, *supra* n 4, at 109.

<sup>85</sup> See also Sheppard, *supra* n 19, at 52.

One attempt to articulate the meaning and scope of Article 21(3) can be found in the Separate Opinion of Judge Pikis in 2006.<sup>86</sup> In his Separate Opinion, Judge Pikis considered that “[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions”.<sup>87</sup> Whilst this reasoning draws a connection between the rights identified under Article 21(3) of the Rome Statute and the sources of law encompassed by Article 21(1) of the Rome Statute, it does not provide a clear answer as to what role regional human rights jurisprudence can play in their identification.<sup>88</sup> Furthermore, whilst it recognises that human rights acknowledged by customary international law and international treaties and conventions may be regarded as “internationally recognised”, it does not indicate whether rights included in regional human rights treaties can fall within the ambit of the provision. As Sheppard has highlighted, the reasoning of Judge Pikis “neither accepts nor excludes the possibility of a regional customary principle being sufficient, nor does it address whether, if something short of universality is permissible, to what extent it matters who is and is not bound by the rule”.<sup>89</sup>

Consequently, whilst the ICC’s decisions in the *Lubanga* case show that the judges of the ICC have referred frequently to the decisions of regional human rights courts and have, at times, attributed those decisions significant weight, the judicial understanding of how reference to regional human rights jurisprudence fits with the Court’s rules of applicable law and interpretation remains unclear.

## 5. IMPLICATIONS OF THE COURT’S APPROACH TO REGIONAL HUMAN RIGHTS JURISPRUDENCE IN THE *LUBANGA* CASE

The decisions of the ICC in the *Lubanga* case reveal a large degree of engagement on the part of the Court’s judges with regional human rights jurisprudence. The practice of the Court is significant in light of the benefits referred to in Section 2, above.

The Court’s case law indicates that the judges of the ICC are contributing to the coherence of international law in areas of concern to the ICC and human rights courts. The contribution of the judges is apparent in situations where regional human rights jurisprudence has been used to elaborate on key concepts found in the Rome Statute and to support the introduction of new powers into the applicable law of the ICC. Even where regional human rights jurisprudence has been used simply to support a conclusion that has been reached for other

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<sup>86</sup> *Lubanga* ICC-01/04-01/06-424, Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la defence en repose au memoire d’appel du Procureur”’, Separate Opinion of Judge Pikis, Appeals Chamber, 12 September 2006, para 3.

<sup>87</sup> *Ibid.*

<sup>88</sup> Bailey, “Article 21(3) of the Rome Statute: A Plea for Clarity” (2014) 14 *International Criminal Law Review* 513, at 523-24.

<sup>89</sup> Sheppard, *supra* n 19, at 48.

reasons, cross-referencing has helped the ICC and regional human rights courts to “speak with the same voice” on a range of legal issues, from the meaning and scope of fair trial standards to the rights of victims to participation and reparations, and to identify synergies in the jurisprudence of the ICC and regional human rights courts which can be built upon in future years. The same is true where judges have referred to regional human rights jurisprudence simply to identify an overlap between the provisions of the Rome Statute and human rights law.

The ICC’s approach to regional human rights jurisprudence in the *Lubanga* case can also be seen to have contributed to the quality of the Court’s case law. By referring to external jurisprudence in the *Lubanga* case, including that of regional human rights courts, the judges of the ICC built the foundation for the ICC’s case law with the benefit of the experience and expertise of established institutions. At times, the decisions of the ICC in the *Lubanga* case suggest that reference to regional human rights jurisprudence has not only served to introduce new ideas into the judicial decision-making process, but that it has also contributed to the depth of discussion on issues that have arisen for adjudication before the ICC. This is evident, for example, where the decisions of human rights courts have been referred to in separate and dissenting opinions, on points of law that have triggered disagreement between the Court’s judges.<sup>90</sup>

Furthermore, the connection drawn between the ICC’s case law and the decisions of regional human rights courts has the potential to enhance the weight and perceived legitimacy of the Court’s decisions in the eyes of interested onlookers. The extent to which reference to the case law of regional human rights courts has, in fact, affected perceptions of the ICC cannot be determined by analysis of the Court’s decisions alone.

The greatest concern raised by the ICC’s use of regional human rights jurisprudence in the *Lubanga* case is that the failure of judges to justify the practice by reference to the Court’s own rules of applicable law and interpretation and explain the weight that has been given to them could lead to indeterminacy and a sense of “*ad hocism*” in the Court’s jurisprudence.

Writing extra-judicially, former President of the ICTY, Judge Antonio Cassese, has raised a similar concern in relation to the use of regional human rights jurisprudence by the *ad hoc* tribunals, the ICTY and the ICTR. In his analysis of the approach of the *ad hoc* tribunals, Cassese drew a distinction between a “wild” and a “wise” approach to external

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<sup>90</sup> See, for example, *Lubanga* ICC-01/04-01/06-925, supra n 45, paras 14 and 16; *Lubanga* ICC-01/04-01/06-1311-Anx3, Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, Trial Chamber I, 28 April 2008, para 10; *Lubanga* ICC-01/04-01/06-1487, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the release of Thomas Lubanga Dyilo, Appeals Chamber, 21 October 2008, dissenting opinion of Judge Georgios M. Pikis, paras 12-14.

jurisprudence.<sup>91</sup> The former refers to the practice by which judges refer to external case law “directly to resolve the legal problem before them” without reference to the sources of law that they were permitted to apply.<sup>92</sup> The latter describes an approach that reflects a “rigorous legal conception of the role and functions of international tribunals and the sources of law from which they may draw”.<sup>93</sup> According to Cassese, the “wise” approach is to be preferred on the basis that an explanation of the legal logic behind a decision is required “not only for reasons of legal rigour, but also to satisfy the fundamental requirements of the principle of fair trial”.<sup>94</sup> A “wild” approach has the potential to produce unfairness by preventing the defence from understanding and anticipating the approach that judges may take in future cases.<sup>95</sup>

The approach of the judges in the *Lubanga* case, described in Section 4 above, reflects the “wild” approach to regional human rights jurisprudence under Cassese’s conceptual framework. The implications of this approach extend beyond the fairness and rigour of the ICC’s decisions. The absence of an explanation as to how regional human rights jurisprudence has been used in the decisions of the ICC could also undermine the legitimacy, and hence the effectiveness, of the ICC insofar as it reduces the clarity of the Court’s applicable law and raises questions about the source of authority underpinning its decisions.<sup>96</sup> To avoid the risks associated with a “wild” approach to external jurisprudence, the judges of the ICC must explain how reference to the decisions of human rights courts fits within the ICC’s sources of applicable law and interpretation and the weight that they have been given whenever they are referred to.

The importance of a “wise” approach to regional human rights jurisprudence is heightened by the Court’s disproportionate number of references to the case law of the ECtHR vis-à-vis other international, regional and domestic mechanisms. It has been highlighted above that throughout the *Lubanga* proceedings, the Court’s judges only referred to the two most well-established human rights courts: the ECtHR and the IACtHR. The number of references to the ECtHR (46) was almost double the number of references to the IACtHR (25). On occasion, the judges of the ICC referred to the outputs of international human rights mechanisms in the *Lubanga* case, either alongside<sup>97</sup> or instead of<sup>98</sup> references to regional

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<sup>91</sup> Cassese, *supra* n 24.

<sup>92</sup> *Ibid*, p. 21.

<sup>93</sup> *Ibid*, p.20.

<sup>94</sup> *Ibid*, p.21.

<sup>95</sup> *Ibid*, p.21.

<sup>96</sup> Franck, *supra* n 9, at 713-35.

<sup>97</sup> See, for example, *Lubanga* ICC-01/04-01/06-108, *supra* n 65, para 13, footnote 10 (referring to Human Rights Committee General Comment No. 27, Freedom of Movement (Art. 12), CCPR/21/Rev.1/Add.9, 2 November 1999, para. 16); *Lubanga* ICC-01/04-01/06-424, *supra* n 86, Separate Opinion of Judge Georgios M. Pikis, para 6, footnote 10 (referring to *Views of the Human Rights Committee on Communications* 207/86 (Morael v. France) para.9.3 and 514/92 (Fei v. Colombia) para. 8.4).

human rights jurisprudence. However, references to the regional human rights courts were far more prolific.

The Court's focus on the ECtHR and the IACtHR in the *Lubanga* case is understandable. They were the two most well established human rights courts in operation at the time that the proceedings took place. The only other operational regional human rights court, the African Court of Human and Peoples' rights (ACtHPR), had a small body of jurisprudence at the time of the *Lubanga* proceedings, having delivered its first substantive judgment on the merits of a case in 2009.<sup>99</sup> The length of the ECtHR's operation and the quantity of relevant case law that it had produced explains the disproportionate number of references to the ECtHR vis-à-vis the IACtHR. Nonetheless, the data suggests that the certain regional values, particularly those of European nations, may be having a disproportionate impact on the ICC's jurisprudence. The frequency of reference to the European and Inter-American institutions is particularly striking in light of the fact that the *Lubanga* case stemmed from a situation in Africa, as had all of the Court's situations at the time that the *Lubanga* case was being heard.

Against this background, a "wild" approach to regional human rights jurisprudence is deeply problematic. In order to counter concerns that the ICC's reference to regional human rights will undermine the international nature of the ICC, it is crucial that the judges of the ICC provide clear reasoning, explaining how regional case law fits within the ICC's rules of applicable law and interpretation.<sup>100</sup> This is important in order to show that regional human rights jurisprudence is not being relied upon as a source of law in its own right, but as a means of identifying or interpreting the sources of law that the judges of the ICC are authorised to apply. By indicating how reference to regional human rights jurisprudence fits within the ICC's legal framework, the judges of the ICC can not only enhance the transparency of the Court's decision-making, but also provide reassurance that reference to regional human rights jurisprudence is being used to assist in the identification of law that is of a truly international character.

A second trend in the *Lubanga* proceedings, which underlines the importance of a "wise" approach to regional human rights jurisprudence, is the Court's practice of using the case law to support the interests of victims as well as the rights of the accused. In the *Lubanga* case, regional human rights jurisprudence was not expressly referred to in the interpretation of the relevant crimes and modes of liability. Consequently, concerns relating to compliance with the principle of legality were not raised. Reference was, however, made to regional

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<sup>98</sup> *Lubanga* ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, 10 July 2012, Dissenting Opinion of Judge Odio Benito, at para 21, footnote, 37 (referring to a Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Violence against Women, 11<sup>th</sup> session, 1992, para. 7).

<sup>99</sup> *Matter of Michelot Yogogombaye v. Republic of Senegal* Application No. 001/2008, 15 December 2009.

<sup>100</sup> Young, *supra* n 20, at 206.

human rights jurisprudence when considering the rights of victims to reparation and in determining the scope of victim participation at the ICC under Article 68(3) of the Rome Statute. Whilst these issues do not concern the scope of criminal liability, the Court's interpretation of the rights of victims has clear implications for the interests, if not the rights, of the accused.

The potential for regional human rights jurisprudence to affect the balance between the interests of victims, on the one hand, and the rights of the accused, on the other, increases the importance of clear legal reasoning on the part of the judges. A "wise" approach to external jurisprudence, which explains reference to regional human rights jurisprudence by reference to the ICC's rules of applicable law and interpretation, is necessary in order to allow the Court's defence counsel to challenge reasoning that has negative implications for the rights of the accused and protect the fairness of the Court's proceedings. Clear and transparent reasoning may also encourage restraint in the ICC's use of regional human rights jurisprudence in areas where the rights of the accused are at stake and provide reassurance to actors beyond the Court of the strength of the Court's reasoning where the interests of victims and the accused collide.

## **6. BUILDING ON *LUBANGA*: CLARIFYING THE INTERACTION BETWEEN THE ICC AND REGIONAL HUMAN RIGHTS COURTS**

In order to avoid the risks outlined above, it is important that the ICC develops and presents a clear and consistent approach to regional human rights jurisprudence, which explains references to such jurisprudence by references to the ICC's own rules of applicable law and interpretation. In order to do so, questions must be resolved as to the meaning and scope of Article 21(3) of the Rome Statute and its relationship with the ICC's sources of applicable law, set out in Article 21(1) of the Rome Statute, and the ICC's rules of treaty interpretation, found primarily in Articles 31-33 of the Vienna Convention.

The first set of questions goes to the significance of regional human rights jurisprudence under Article 21(3) of the Rome Statute. The role of such jurisprudence depends on whether Article 21(3) is being used as a basis to incorporate new principles or rules into the ICC's system of justice or as a principle of interpretation, to shed light on the meaning and scope of provisions of the Rome Statute and its accompanying Rules of Procedure and Evidence and Elements of Crimes. Where Article 21(3) is used as a basis for the incorporation of new principles or rules into the ICC's legal regime, a "wise" approach to external jurisprudence requires that those principles or rules have their basis in the sources of law outlined in Article 21(1) of the Rome Statute, i.e. that they constitute either a principle or rule of international law (referred to in Article 21(1)(b) of the Rome Statute) or a general principle derived by the Court from the national laws of legal systems of the world (as provided for in

Article 21(1)(c)). Regional human rights jurisprudence is significant insofar as it provides evidence of either source.

It is relevant to note here that in its 2006 decision on the stay of proceedings in the *Lubanga* case, the Appeals Chamber of the ICC considered that there was no room for application of the principle or doctrine of abuse of process under Article 21(1) of the Rome Statute because the Rome Statute dealt with the grounds for relinquishing jurisdiction exhaustively in Article 17, meaning that there was no lacuna in the Rome Statute allowing reference to the sources of law referred to in Articles 21(1)(b) and (c).<sup>101</sup> It found that the principle could be applied under Article 21(3), but without a clear explanation of its legal basis under the ICC's rules of applicable law.<sup>102</sup> Whilst this approach allowed the Appeals Chamber to create a remedy for violations of human rights in judicial proceedings before the ICC,<sup>103</sup> it left the source of the legal obligation being introduced unclear. Reference to the sources of law in Article 21(1) would have introduced greater clarity and rigour into the Court's reasoning, thereby avoiding the negative implications of the "wild" approach to external jurisprudence discussed above.

Where regional human rights jurisprudence is used in the interpretation of the provisions of the Rome Statute and its accompanying documents, the source of law being referred to rests in Article 21(1)(a). Regional human rights jurisprudence simply forms part of the interpretive material that the judges of the ICC can refer to in the interpretation of the Court's basic documents. In the interests of clarity, and in light of concerns relating to the potential for reference to regional mechanisms to introduce cultural bias into the case law of the ICC, it is important that judges explain the weight that has been given to the decisions of regional human rights courts under Article 21(3) of the Rome Statute and the extent to which they reflect "internationally recognised" human rights. Reference to a range of regional, domestic and international mechanisms may help to provide evidence of the international nature of the rights being referred to.

The second set of questions goes to the relationship between Article 21(3) of the Rome Statute and the ICC's other rules of applicable law and interpretation. Again, the issues differ depending on the use of Article 21(3). Where used as a basis to incorporate new rules or principles into the ICC's system of justice, it is important that judges take a clear and consistent approach to any conflicts that arise between internationally recognised human rights, on the one hand, and the sources of law referred to in Article 21(1) of the Rome Statute, on the other. In particular, it is important that a clear and consistent approach is taken to conflicts between the text of the Rome Statute and rights identified under Article 21(3).

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<sup>101</sup> *Lubanga* ICC-01/04-01/06-772, supra n 73, para 34.

<sup>102</sup> *Ibid*, paras 36-39.

<sup>103</sup> See discussion in Bailey, supra n 88, at 536.

Where regional human rights jurisprudence is used in the interpretation of the Rome Statute, a “wise” approach to external jurisprudence would require explanation of how comparative reasoning fits within the rules that guide the interpretation of the Rome Statute. A key question is whether the practice fits within the interpretive framework set out in the Vienna Convention on the Law of Treaties (1969), for example in Article 31(3)(c) of the Vienna Convention, or whether it lies beyond it. A further question concerns the resolution of a conflict between compliance with internationally recognised human rights conflicts and the interpretation of the Rome Statute under the rules set out in the Vienna Convention, for example where the ordinary meaning of a provision in context and in light of the object and purpose of the treaty conflicts with internationally recognised human rights. Such issues are already being raised in the case law of the ICC, highlighting the need for the development of a clearly reasoned and consistent approach.<sup>104</sup>

Consideration of the issues outlined above on a case-by-case basis may produce a fragmented approach to regional human rights jurisprudence and create greater uncertainty. A set of judicially developed guidelines establishing the role of regional human rights jurisprudence in judicial decision-making at the ICC could, therefore, play a useful role in promoting consistency in the Court’s reasoning. By developing a framework which is rooted in the ICC’s rules of applicable law and interpretation, the judges of the ICC could help to ensure that the risks associated with the Court’s engagement with regional human rights jurisprudence are reduced, if not avoided altogether.

## 7. CONCLUSION

The ICC’s decisions in the *Lubanga* case indicate the emergence of a strong relationship between the ICC and regional human rights courts, particularly the ECtHR, in the early years of the Court’s operation. Content analysis of the ICC’s decisions in the *Lubanga* case reveals that the judges of the ICC have referred to the decisions of the ICC frequently and on a range of legal issues throughout the pre-trial and trial process. The analysis also shows that the decisions of regional human rights courts have, at times, been given significant weight in the Court’s reasoning. The Court’s decisions suggest that the practice has been driven, in part, by the wording of Article 21(3), which has been widely recognised as providing a legal basis, if not an obligation, to refer to regional human rights jurisprudence.

The willingness of the judges of the ICC to refer to and draw from regional human rights jurisprudence in the *Lubanga* proceedings has beneficial implications for the ICC and the broader development of international law. Perhaps most importantly, judicial interaction

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<sup>104</sup> See, for example, *Katanga and Chui* ICC-01/04-01/07-3003, Decision on an *Amicus Curiae* Application and on the “*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile*” (articles 68 and 93(7) of the Statute), Trial Chamber II, 9 June 2011. For discussion, see G. Hochmayr, *supra* n 35, at 676-78.



has contributed to the coherence of international law on matters of mutual concern for the ICC and human rights courts, thus adding to the clarity and, in turn, the strength and effectiveness of international law. The *Lubanga* case law also suggests that the Court's engagement with regional human rights jurisprudence is contributing, in some respects, to the quality of the Court's decisions. Engagement with regional human rights jurisprudence has also allowed the judges of the ICC to provide evidence of conservatism and support for their reasoning, which may enhance the perceived legitimacy of their case law.

The greatest concern raised by the Court's practice is the absence of a clear methodology for reference to regional human rights jurisprudence in the reasoning of the chambers. Throughout the *Lubanga* proceedings, the judges of the ICC have tended to provide little explanation for their reference to the decisions of regional human rights courts and how this body of jurisprudence fits within the ICC's rules of applicable law and interpretation, even in situations where the jurisprudence has been given significant weight. Whilst there are some occasional references to Article 21(3) of the Rome Statute as a basis, or even an obligation, for reference to regional human rights jurisprudence, the judges of the Court have not clarified how regional human rights jurisprudence contributes to the identification of "internationally recognised human rights" and how Article 21(3) fits with the ICC's rules of applicable law and interpretation more generally. The lack of clarity is problematic insofar as it creates indeterminacy in the ICC's decision-making, which has implications for the law's fairness, effectiveness and perceived legitimacy. Ambiguity in the Court's approach to regional human rights jurisprudence is particularly concerning in light of further trends identified in the Court's case law, namely the disproportionate number of references to the case law of the ECtHR and the willingness of the ICC's judges to refer to human rights jurisprudence to support the rights of victims as well as those of the accused.

In light of these concerns, it is important that the ICC's reference to regional human rights jurisprudence is placed on a clearer footing. This may be facilitated by the adoption of a set of judicially created guidelines, which address the role of regional human rights jurisprudence in the ICC's decision-making by reference to the ICC's sources of applicable law and interpretation. By establishing a clearer basis for interaction between the ICC and human rights courts, and explaining the rationale for referring to regional human rights jurisprudence in the case law of the ICC, the judges of the ICC can help to secure the benefits of a strong interaction with human rights courts, whilst avoiding its risks.